No. 18,675

United States Court of Appeals

For the Ninth Circuit

American Casualty Company of Reading, Pennsylvania, and General Reinsurance Corporation,

Appellants,

vs.

Idaho First National Bank, National Association, Executor of the Estate of V. A. Roberts, Deceased, and Ellen M. Roberts,

Appellees.

APPELLANTS' REPLY BRIEF

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APPELLANTS' REPLY BRIEF

STATEMENT

Appellees have seen fit to restate this case. However, they have not limited their statement to facts. The statement made in Appellees' Brief is replete with inference and innuendo which the Appellees deem beneficial to their position. We do not deem it necessary to discuss this matter item by item, but will point out one or two illustrations.

On page 7 of Appellees' brief, it is stated:

> "It was quite apparent also that Roberts was not financially able to take over the project and

> that the bonding company would have to do so * * * on this specific premise * * *."

The record shows that Roberts stated he could not and would not finance or take over the Amarillo project. All that this record shows is that Roberts refused to do anything whatsoever, although he knew from his own agent, Wise, that the loss could well exceed $1,000,000.00. (Wise Dep., pp. 55-56, ff. 22-25.) The uncontroverted fact remains that as an inducement to the issuance of this bond and the acceptance of Roberts' indemnity, he had furnished a financial statement to American Casualty Company showing net assets applicable to this indemnity of $2,500,000.00. (Exhibit 4.)

> On page 10, relating to the Vitt pledge, it is stated: "A pledge agreement was prepared by American's attorney, Willets * * * and presented to Vitt for execution * * *."

The fact of the matter is that while the agreement was prepared by Willets in rough draft, and presented to Mr. Vitt in that form, Mr. Vitt was represented by his counsel, Mr. Oswald, who had the draft in his office for a day or day and a half, and the final agreement was the result of negotiations between Vitt's counsel and American's counsel. (Bennett Dep., p. 53, ff. 24-25; p. 54, ff. 1-21.)

Appellees would infer that Vitt had no voice in the preparation of this pledge, but the facts are otherwise.

On page 13 of the brief, Appellees infer that the findings of the Court are those of Appellants' counsel. It is true that the Court, by its decision, ordered Appellants' counsel to prepare and submit findings in accordance with the decision, which counsel did. These findings were lodged in accordance with the rules, and the Appellees filed voluminous objections thereto, in which they set out many of the inferences contained in their statement of facts in their brief, but the trial Court rejected all these objections, with the exception as to the allowance of interest. The findings before the Court on appeal are those of the trial Court, and were determined by the trial Court to be correct over the objections of Appellees.

ARGUMENT

TIME FOR ALLOWANCE OF INTEREST.

Appellees have wholly failed to answer many of the cases cited in Appellants' brief. They attempt to distinguish *Hendricks v. Goldridge Mines, Inc.,* 56 Idaho 325, 54 P.2d 254, and *Guyman v. Anderson,* 75 Idaho 294, 271 P.2d 1020, from the case at bar on the ground that these were enforcement of mechanics' liens. They have not, however, considered the language of the Idaho Court construing Section 27-1904, Idaho Code. In the *Hendricks* case, the Court stated:

> "It [the statute] is dealing with the subject of money due on contracts, either express or implied, and applies as well to unsettled and disputed accounts as to those where the specific sum due is fixed and determined. The only condition

is that it shall be a claim arising on a contract, express or implied."

The nature of the actions is not significant. Appellees cite *Lungren v. Freeman,* 307 F.2d 104, but this case is not applicable to the case at bar. In the first place, the statutes involved were those of the State of Oregon, which are not similar to the State of Idaho. Secondly, the facts are greatly different, inasmuch as the action involved arbitration and an award made by arbitrator. The only other authority upon which Appellees rely for their position concerning the application of the Idaho statute is *Donaldson v. Josephson,* 71 Idaho 207, 228 P.2d 941. This case does not contradict the position taken by Appellants. The action, in the first place, was one for accounting between the parties and the division of certain sugar beet checks, made payable to both parties, some of which were held by Appellant and some by Respondents. There is nothing in this action that resembles an accounting. This action is one solely under Section 27-1904, Idaho Code, subdivisions 1 and 2. It is simply suit for monies due on any contract to pay, against which the defendant asserts credits to be due him. If the position of the Appellees is correct, then interest could never be allowed on any claim under contract where the defendant disputes the amount due. This is patently not the law of Idaho.

Appellees attempt to emphasize that the stipulated reasonable and necessary loss and expenses of American were some $70,000.00, less the amount prayed in the complaint. We do not know whether this Court

will take any cognizance of the items that are not included within the record of the Court in any respect but which are contained in the Appendix to Appellees' brief, it being our understanding that the Court will not consider these matters, but, nevertheless, we believe that we can fairly state that the reason for the Amarillo agreement and the stipulation of the amounts due was to avoid a long and tedious trial, which would have been required if every voucher and item constituting the accumulated loss of over $1,094,000.00 was presented to the Court through witnesses and identification. This agreement, if the Appellate Court should pay any attention to it, was dated June 13, 1961, and would be in the nature of an account stated. Consequently, interest would be allowed from this date, even under the theories of the Appellees. If the Appellants, who suggested this procedure in lieu of protracted trial, the records and accountings being in the possession of auditors at Amarillo, are to be penalized for such procedures, then it will be necessary, in each instance, to take up the Court's time, at great expense to litigants and the Court, by the identification of every item. The fact that the ultimate agreement was something less than the amount prayed for in the complaint (and an insignificant sum in view of the amount ultimately stipulated) does not in any way indicate that such amounts were not due under the contract of indemnity within the meaning of the Idaho interest statute.

We submit that the Appellees have wholly failed to support the argument that interest should only be al-

lowable after judgment, and we further submit, in answer to the question propounded by Appellees as to why interest is not allowable against the defendants, Appellees have cross-claims against the other defendants in which they are to be awarded judgment to the same amount and extent that they are indebted to Appellants. Consequently, since they should be obligated to pay Appellants the interest from the date the same became due, and certainly not later than the filing of the complaint, they would be entitled to judgment against the cross-defendants to the same extent.

APPELLEES' THEORIES TO SUPPORT APPLICATION OF SET-OFF ARE INSUFFICIENT IN EQUITY OR AT LAW.

The Appellees begin their argument with the statement,

> "Unfortunately, the findings of this case, as prepared by Appellants' counsel and adopted by the Court, are meager in statement of facts which the court obviously found to exist".

We have pointed out before that the Appellants' version of the facts of this case was submitted to the trial Court in their objections to findings of fact and conclusions of law which appear at page 79, et seq., in the transcript of record of this matter, and were rejected by the Court. As stated in Appellants' Opening Brief, the Court apparently found as a matter of law that the pledge of securities should be applied to the credit of the indemnitors, Roberts. There is no

other conclusion that may be raised from the opinion or the findings.

Appellees devote several pages of their brief to their inferences and impressions from the evidence and assume that there was an agreement. However, even the engineer and attorney employed by Roberts stated that there was no distinct agreement, but simply how they "understood" the conversation. (Wise Dep., p. 18; Cromwell Dep., p. 21.)

Again, the Appellees, on pages 26 and 27 of their brief, assume that Vitt had no choice but to sign the agreement. However, they completely overlook the fact that Vitt had the advice of counsel, and that Vitt and his counsel had the rough draft of the agreement at least a day and a half before the agreement was typed in final form. (Bennett Dep., p. 53, ff. 24-25, p. 54, ff. 1-21.) In the several pages of Appellees' brief in which they attempt to set up some sort of agreement and allege a misappropriation of assets, they do not attempt to explain why they did not obtain Vitt's testimony by deposition or otherwise, or Roberts' testimony for that matter. Certainly Vitt, being the party who signed the agreement and who was probably more disinterested than anyone, would have been the party most knowledgeable of any agreement or the breach thereof. The fact is that there was no basis for complaining about the application of the securities of the Vitt Construction Company, which were pledged.

Regardless of these statements, we submit to the Court that as a matter of law, the record does not

permit the entry of the judgment applying these credits to the amount of the pledged assets to the indemnitors, Roberts.

APPELLEES' EQUITABLE DEFENSIVE THEORIES.

The Appellees, on page 31 of their brief, and thereafter, state that they rely upon the maxims of equity and the rule that the Court should grant all proper relief to which a party is entitled as disclosed by the facts of the case. This proposition, in general, cannot be contested. However, it cannot be strained to the extent of applying to this case. By extending such credit, the Court is, in effect and actually, reforming the pledge agreement executed by Mr. and Mrs. Vitt and the Vitt Construction Company. The Vitt Construction Company, as shown by the joint control agreement relating to Whidbey Island (Defendants' Exhibit 8), and the pledge agreement (Defendants' Exhibit 9), was an indemnitor and principal on the Whidbey Island job, but was not a party to the Amarillo project. We do not believe that this general proposition expressed in Rules 2 and 54(c) of the Federal Rules of Civil Procedure can be stretched to the point of reforming an instrument where all of the parties are not before the Court.

K. H. Vitt and Catherine Vitt were never brought within the jurisdiction of this Court and, although named parties defendant by the plaintiff and cross-defendants by the Appellees, were never served with process. It is uniformly held that all parties to the

instrument are necessary parties in any action to reform a written instrument. (76 C.J.S., p. 423.) So far as Vitt is concerned, the pledge agreement executed by him and concurred in by him stands and is applicable to his obligation arising out of the Whidbey Island indemnity agreement, which he and Vitt Construction Company executed as a part of their application for bond. If the judgment in this case is permitted to remain in its present form, the American Casualty Company would be required to extend this credit twice or in double the amount provided by the agreements.

If Roberts was seriously contending that Vitt avoided his obligation of assigning his assets to Roberts and seriously thought that he could establish that the pledge agreement was contrary to the so-called understanding at Roberts' house, then the proper action would have been to bring suit against Vitt for the reformation of this pledge agreement. American is in no position to prosecute such suit, because American contends there was no such understanding and that Vitt was free to apply his property as he saw fit.

On page 32 of their brief, Appelles, by inferences, charge American with fraud, although at the same time stating that it is not necessary. Vitt participated in the conversations, as is shown in many places in the depositions, and if there was any agreement for the application of his assets with Roberts, it would have been made with Vitt, and Roberts should have attacked Vitt on this basis. The fact that no effort

was made toward Vitt, either by testimony or by way of action, loudly contradicts all of the Appellees' statements concerning understandings, fraud, equity, etc.

THEORY OF EQUITABLE ESTOPPEL.

At page 35, the Appellees state it is immaterial that Bennett, at the time of the meeting, had no intent to deceive Roberts and was acting entirely in good faith. Appellees then state that in taking the Vitt pledge American was guilty of constructive fraud, and under the doctrine of equitable estoppel was properly prevented by the Court from the misapplication of such assets. In support of its theory of equitable estoppel, the Appellees cite but one case (*Union Oil Company of California v. Lull,* 349 P.2d 243, 250). There are several distinctive features about this case. One is, and we think most important, the indemnitor in this case was not engaged in the indemnity business, whereas Roberts was a professional indemnitor, and, in this instance, received $75,791.46. A compensated indemnitor is not a favorite of the law, and his contract will be construed against him. (*Rose v. Ramm,* 254 Mich. 259, 237 N.W. 60; *Union Paving Co. to use of U. S. Casualty Co. v. Thomas,* 103 F.Supp. 408.) In the *Union Oil* case, which involved a claim by reason of charges made upon a stolen credit card against the owner of the card, the Court stated:

> "In determining the liability of the indemnitor in this case we may consider the fact that *he is not engaged in the indemnity business,* and there-

> fore without the opportunity to calculate his risk and charge a premium accordingly." (Emphasis ours.)

Even though this was so, the Oregon Court held that the indemnitor was responsible, the only obligation of the indemnitee being the reasonable inquiry as to the authority of the person who presented the card for services.

Hiern v. St. Paul Mercury Indemnity Co., 262 F.2d 526, is not in point, because in that case the Court emphasized that it based its decision upon a misrepresentation of a fact that was represented to have been done and not a future promise.

In *United States Fidelity & Guaranty Co. v. Putfark,* 158 So. 9, cited by the Appellees, the situation is vastly different than here. In this case, the indemnitor was very active in assisting in the completion of the job and the Court noted in the decision that the indemnitor "had a vital interest in protecting his interest", as distinguished from Roberts' complete inactivity and complete disinterest. In this case, the indemnitee advised the indemnitor he had no further responsibility, whereupon he ceased to become interested. There is no such representation found any place in this record.

Appellees' citation of the *Putfark* case, and their reliance upon equitable estoppel, brings the true picture of Roberts' position before the Court. The *Putfark* case was decided by the Louisiana Supreme Court, which subsequently, in *Fidelity & Deposit Co.*

v. Thiem, 193 So. 496, considered this case. In the *Thiem* case, the indemnitor, as Roberts here, refused and neglected to do anything to protect himself or have any interest in the default of the principal. The indemnified surety was required to pay the loss, and brought suit against the indemnitor to recover under the indemnity agreement. The defendant indemnitor defended on the ground that the surety had acted wrongfully to the prejudice of the indemnitor, relying upon the *Putfark* case. The Court held that the indemnitor, by failing to exercise his rights upon being notified of the default, was estopped to complain of the actions of the surety, and that *Putfark,* if authority for anything, is authority for this position. In describing the obligations of the indemnitor, it is stated:

> "He [indemnitor] did not speak when he should have done so. It is now too late to escape the responsibility which his own silence and action superinduced."

The Court thereupon held that, having so refused and neglected to take any interest in the matter, he was estopped to complain of the surety's subsequent procedure.

It is further interesting to note that Roberts was to be paid under the indemnity agreement (Plaintiffs' Exhibit 1) his premium of 1% of the total job as the job progressed. The total amount of this premium was $75,791.46, which was fully paid as acknowledged by Appellees in their brief at page 12. The job was not complete when Roberts was notified of the de-

fault of the principal, Wise estimating that it might have been 90% complete. (Wise Dep., p. 16.) Under the government contract, as set forth in Exhibit 1, payments were to be made as work was performed, with the usual 10% retainage. When the notice of default was made, Roberts had not earned and was not entitled to payment in the whole amount of the premium charged by him, but was to be paid as payment was made and the job completed. Even though American Casualty Company had to spend over $1,000,000.00 in completing the job, Roberts received, on completion of the job, his entire premium. If there is an estoppel, it applies to Roberts, who received the entire benefits of his contract but now attempts to avoid liability. (*Bryce Plumbing & Heating Co. v. Maryland Casualty Co.,* 21 F.Supp. 854.)

The only thing that Roberts has ever done was to send his attorney and engineer to Amarillo upon receipt of the notice to verify that there was a loss for his own information, and thereafter state that he was financially and physically unable to perform any obligations of his agreement. He did not contact the principals, Stringfellow, Johnson or Vitt; he did not attempt to obtain any assignment of any assets to himself or American from Vitt, even though Vitt was present with his counsel at Roberts' home. He did not at any time express any interest whatsoever in the matter. He refused to guarantee a loan to be obtained by the principals.

It is interesting to note that although Roberts' attorney was fully advised of the Vitt pledge on Oc-

tober 14, 1959 (Brief of Appellees, p. 30) if not advised previously thereto, no action was taken other than a letter by Mr. Anderson (Defendants' Exhibit 10), and no tender of that portion of the premium, which would not have been the whole, was made to anyone. No objection was ever made to Vitt. We think it is reasonable to assume that since the job at that time was only 90% complete that Roberts received and accepted the final payments on his premium after the Anderson letter, at least the same were not due prior to that time. Consequently, if there is any estoppel on the part of anyone in this case, it is that Roberts is estoppped to complain of the contract executed by Mr. Vitt.

Appellees have wholly failed to answer the arguments of Appellants that pledge agreements must be enforced as written and assets pledged to secure one obligation at the direction of the pledgor may not be applied against a different obligation, as set forth in Appellants' Opening Brief; have completely failed to answer or consider that the doctrine of "marshaling assets", referred to by the Court and counsel, is completely inapplicable to the case at bar.

We submit that the Trial Court could not reform the pledge agreement in the absence of all the parties before the Court, and could not change the application of the pledge in this action indirectly as it has done in this case. We further submit that under the laws and statutes of Idaho, interest should be allowed from the date the amount became due, and in no event later than the filing of the complaint, as set out by

Judge Cavanah in *U. S. v. Mitry Bros.,* 4 F.Supp. 216, affirmed in this Court 75 F.2d 79. We submit that insofar as the application of the assets of the pledge is concerned, and the allowance of interest, the judgment is in error, that the judgment in these respects should be reversed with instructions to the Trial Court to revise the judgment by the elimination of the credits of the pledged assets to the indemnitors, Roberts, and to allow interest to plaintiffs from the date of the complaint at the latest.

Dated, Boise, Idaho,
October 25, 1963.

Respectfully submitted,
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